



In the Matter of:

DEVELOPMENT RESOURCES, INC.

ARB CASE NO. 02-046

DATE: April 11, 2002

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Administrator:

Eugene Scalia, Esq., Steven J. Mandel, Esq., Douglas J. Davidson, Esq.,
Marva M. Peace-Jackson, Esq., *U. S. Department of Labor, Washington, DC*

For Development Resources Inc.:

Richard I. Manas, Esq., *Oppenheimer, Blend, Harrison & Tate, San Antonio, Texas*

FINAL DECISION AND ORDER

This case arises under the Service Contract Act and implementing regulations. McNamara-O'Hara Service Contract Act, 41 U.S.C.A. §§351-354 (West 1987) (SCA or Act); 29 C.F.R. §§4.12 and 4.188(c) (2001). Development Resources, Inc. (DRI) appeals from a determination by the Administrator, Wage and Hour Division, Employment Standards Administration (the Administrator) that DRI's President, Executive Director and Registered Agent, Terry Samuel, had a substantial interest in DRI while Samuel was under debarment for violating the SCA. DRI also asserts that relevant facts are in dispute.

We have jurisdiction to review the Administrator's determination pursuant to 29 C.F.R. §§4.12(f), and 8.7(b), and Department of Labor Secretary Order No. 2-96, 61 Fed. Reg. 19978 (May 3, 1996).

By means of the Service Contract Act, Congress established labor standards, such as minimum wage requirements, for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal Agencies. 41 U.S.C.A. §351. Except under unusual circumstances, contractors who violate the Act's requirements are debarred from contracting with any federal agency for a period of three years. *Id.* at §354(a).

This debarment period applies not only to the violating contractor, but also to any person or firm in which the debarred contractor holds a substantial interest. *Id.* at §354(a) ("Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States

shall be awarded to . . . any firm, corporation, partnership, or association in which [debarred] persons or firms have a **substantial interest** until three years have elapsed from the date” the debarred person’s name appears on the Comptroller General’s list of ineligible contractors).^{1/} (emphasis added)

Congress did not define the term “substantial interest.” However, implementing regulations list specific connections between a debarred person and a firm that establish a substantial interest *per se*. 29 C.F.R. §4.188(c). Itemized connections include part ownership in the firm, participation in the firm’s contract negotiations, and as particularly relevant in this case, service as an officer in the firm, i.e., “where a person is an officer or director in a firm . . . a ‘substantial interest’ will be deemed to exist.” *Id.* at. 188(c)(1).^{2/}

^{1/} The Comptroller General’s list is maintained by the General Services Administration on its internet home page under the heading, “List of Parties Excluded from Federal Procurement and Nonprocurement Programs.” www.gsa.gov.

^{2/} 29 C.F.R. §4.188(c) provides:

[T]he term *substantial interest* is not defined in the Act. Accordingly, this determination, too, must be made on a case-by-case basis in light of the particular facts, and cognizant of the legislative intent "to provide to service employees safeguards similar to those given to employees covered by the Walsh-Healey Public Contracts Act". *Federal Food Services, Inc.*, Decision of the ALJ, SCA 585-592, November 22, 1977. Thus, guidance can be obtained from cases arising under the Walsh-Healey Act, which uses the concept "controlling interest". See *Regal Mfg. Co.*, Decision of the Administrator, PC-245, March 1, 1946; *Acme Sportswear Co.*, Decision of the Hearing Examiner, PC-275, May 8, 1946; *Gearcraft, Inc.*, Decision of the ALJ, PCX-1, May 3, 1972. In a supplemental decision of February 23, 1979, in *Federal Food Services, Inc.* the Judge ruled as a matter of law that the term "does not preclude every employment or financial relationship between a party under sanction and another * * * [and that] it is necessary to look behind titles, payments, and arrangements and examine the existing circumstances before reaching a conclusion in this matter."

(1) Where a person or firm has a direct or beneficial ownership or control of more than 5 percent of any firm, corporation, partnership, or association, a "substantial interest" will be deemed to exist. **Similarly, where a person is an officer or director in a firm** or the debarred firm shares common management with another firm, **a "substantial interest" will be deemed to exist.** Furthermore, wherever a firm is an affiliate as defined in § 4.1a(g) of Subpart A, a "substantial interest" will be deemed to exist, or where a debarred person forms or participates in another firm in which he/she has comparable authority, he/she will be

(continued...)

DRI admits that Samuel served as President, Executive Director, and Registered Agent of DRI at the time he was debarred and thereafter. His term of debarment is September 30, 1999, through September 30, 2002. AR Tab B at p. 3; Tab G at p. 1; Tab L, *In re SCIMCO Building Servs., Inc., Terry Samuel, an individual, and Roosevelt Adams, Jr., an individual*, No. 1996-SCA-32 (ALJ June 17, 1999). Thus, these relevant facts are not in dispute. Samuel's roles as President and Executive Agent qualify as being an officer or director under 29 C.F.R. §4.188(c)(1). He therefore had a "substantial interest" in DRI.

The implementing regulations do not limit substantial interest determinations to the listed connections. "A 'substantial interest' may also be deemed to exist, in other circumstances, after consideration of the facts of the individual case. Factors to be examined include, among others . .

²(...continued)

deemed to have a "substantial interest" in the new firm and such new firm would also be debarred (*Etowah Garment Co., Inc.*, Decision of the Hearing Examiner, PC-632, August 9, 1957). [emphasis added]

(2) Nor is interest determined by ownership alone. **A debarred person will also be deemed to have a "substantial interest" in a firm if such person** has participated in contract negotiations, is a signatory to a contract, or **has the authority to establish, control, or manage the contract performance** and/or the labor policies of a firm. **A "substantial interest" may also be deemed to exist, in other circumstances**, after consideration of the facts of the individual case. **Factors to be examined include**, among others, sharing of common premises or facilities, occupying any position such as manager, supervisor, or consultant to, any such entity, whether compensated on a salary, bonus, fee, dividend, profit-sharing, or other basis of remuneration, including indirect compensation by virtue of family relationships or otherwise. A firm will be particularly closely examined where there has been an attempt to sever an association with a debarred firm or where the firm was formed by a person previously affiliated with the debarred firm or a relative of the debarred person. [emphasis added]

(3) Firms with such identity of interest with a debarred person or firm will be placed on the debarred bidders list after the determination is made pursuant to procedures in § 4.12 and Parts 6 and 8 of this title. Where a determination of such "substantial interest" is made after the initiation of the debarment period, contracting agencies are to terminate any contract with such firm entered into after the initiation of the original debarment period since all persons or firms in which the debarred person or firm has a substantial interest were also ineligible to receive Government contracts from the date of publication of the violating person's or firm's name on the debarred bidders list.

. occupying any position such as manager, supervisor, or consultant to any such entity. . . .” 29 C.F.R. §4.188(c)(3). DRI’s admissions also establish Samuel’s substantial interest in DRI based on his actual powers at DRI, irrespective of his titles. As president, Samuel was “responsible for the general management and direction of the business affairs of the corporation,” and “had authority to appoint and remove inferior officers,” and to “sign deeds, mortgages, bonds, contracts or other instruments in the normal course of corporate business.” AR Tab B p. 4. These facts, which were supplied by DRI and thus are not in dispute, establish that Samuel was in a position to exercise control over the activities of the firm and thereby had a substantial interest in it.

DRI contends Samuel did not have a substantial interest in DRI because he was not personally involved in DRI’s federal contract work. Citing its corporate bylaws, DRI asserts that Samuel had “no authority to conduct the day to day operations, had no authority to manage labor relations for any contracts, had no authority to manage labor relations for DRI, had no authority to execute labor contracts on behalf of DRI, and had no authority to staff and control the employment policies of DRI.” *Id.* However, as the Administrator explained to DRI, “the regulation does not require, as you seem to suggest, that the officer be responsible for ‘labor relations.’” AR Tab A p. 2 . Indeed, the regulatory text is clear that participation in labor relations matters can support a substantial interest finding, 29 C.F.R. §4.188(c)(2), but nowhere suggests that the absence of such participation precludes a substantial interest finding.

DRI claims the Administrator’s decision is contrary to *Facchiano Constr. Co. v. United States Dep’t Labor*, 987 F.2d 206 (3d Cir.), *cert. denied*, 510 U.S. 822, 114 S.Ct. 80 (1993). According to DRI, that decision stands for the proposition that an officer of a company found to have violated Davis-Bacon Act wage and hour requirements cannot be debarred absent evidence of the officer’s personal involvement in and responsibility for labor relations. AR Tab B at p. 3.

However, *Facchiano* is irrelevant to this case. The question in *Facchiano* was whether a company officer could be debarred for willful and aggravated violations of the Davis-Bacon-Related Acts solely on the basis of his status as President of the company. *Facchiano*, 987 F.2d at 214. *Facchiano* arose under a Davis-Bacon Act regulation requiring proof that the individual acted willfully in violating substantive requirements – thus requiring the government to prove *scienter*. *Scienter* is not an element of a substantial interest determination. Instead, substantial interest proceedings focus on the relationship between an individual who has violated labor laws and the firm. Once the requisite type of relationship between the individual and the firm is found to exist, substantial interest is established.

DRI also claims that it has not been afforded “a full and fair hearing in the normal manner provided by law.” DRI March 4, 2002 letter to the ARB. DRI’s objection in this regard appears to be based on the fact that it was not afforded a trial-type hearing to prove Samuel’s non-involvement in DRI’s federal contract activities. However, DRI articulates no reason why it was entitled to a trial-type hearing, nor does it point to any authority in support of its claim. For that reason alone, this objection can be disregarded on review. *Cf. Tolbert v. Queens College*, 242 F.3d 58, 75-76 (2d Cir. 2001) (in the Federal courts of appeals, it is a “settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived”).

In any event, the claim lacks merit. As the Administrator correctly decided, controlling regulations make such matters irrelevant. No one has a right to a hearing on matters of fact that have no legal import. *Cf.* Fed. R. Civ. P. 12(b) (dismissal on the pleadings for failure to state a claim on which relief can be granted). Moreover, we note that the company has received the administrative agency review which is available in a debarment case where relevant facts are not in dispute. The Board has carefully considered all of the evidence in the record before it, including the timely submissions of the petitioner in accordance with 29 C.F.R. parts 4 and 8.

ACCORDINGLY, we affirm the Administrator's decision that Terry Samuel had a substantial interest in DRI during his term of debarment.

SO ORDERED.

JUDITH S. BOGGS

Administrative Appeals Judge

WAYNE C. BEYER

Administrative Appeals Judge

OLIVER M. TRANSUE

Administrative Appeals Judge